No. 22228

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22228

MONROE STREET PROPERTIES, INC., an Arizona corporation, Appellant,

v.

ORVILLE S. CARPENTER, TRUSTEE, etc., Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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Attorneys for Appellant

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COMMENTS ON STATEMENT OF CASE

Appellee's statement of the case endeavors to enlarge the statement of facts, as set forth by the appellant in his opening brief. Appellee, however, has gone beyond the actual facts as disclosed in the transcript of record on file in this matter. By way of example, on page 2, referring to the communication of April 10, 1962 (TR 102) signed by James E. Mack, appellee concludes argumentatively with the statement "*This does not constitute 'verification' that these mortgage liens would be first liens and indeed, such could not be verified.*" (Emphasis added) Nowhere in the record does such a conclusion gain any merit or support.

Additionally, appellee is endeavoring to expand

the issues raised by this appeal in the statement of facts by asserting the contention factually that the motion for summary judgment was granted as the result of plaintiff's failure to answer interrogatories (see pages 5-9, Brief of Appellee). This is not the case for the court entered no order by way of its formal judgment nor in its findings of facts and conclusions of law that supports the conclusion that the summary judgment was granted due to plaintiff's failure to answer interrogatories (see TR 148-56).

REPLY TO APPELLEE'S POSITION REGARDING SPECIFICATIONS OF ERROR I AND II

It appears that appellee, in his brief, concludes from the record only that portion which he chooses to see. He states that there is no dispute in the record as to the following material facts.

On page 9 of his brief it is alleged that Union Title Company, the designated stakeholder of the parties, could not verify that the liens were first mortgage liens. This is a conclusion wholly unsupported by the transcript of record. His purported undisputed

fact on page 10 is likewise a misstatement and conclusion that Monroe Street Properties did not loan any money or give any other consideration to Metropolitan Trust for the notes and mortgages and the basis for this alleged undisputed material fact is predicated upon appellant's answer to interrogatory number 2, Interrogatories to Plaintiffs, set 2 (TR 115). An examination of that answer will disclose that appellee has artfully omitted the word "initially" from his interpretation of the facts. For in fact, initially no consideration was to flow to Metropolitan Trust until after appellee had complied with the contract.

On page 10 of appellee's brief, appellee asserts in item IV a conclusion wholly unsupported by the record that by intimating that the investment stock to be received by appellant was going to be utilized in a secondary distribution. This, too, was not the case, for the record (TR 106) reflects that all of the stock had been assigned to Union Title Company, the stakeholder, and when read in conjunction with the affidavit of James E. Mack (TR 96-100) it can be easily discerned that no secondary distribution of this investment stock was ever contemplated, but that Union Title, who was

in fact the offeree (TR 5-7), was to be the party consummating the transaction and satisfying the encumbrances thereon.

The remaining conclusions in response to Appellant's Specifications of Error I and II, found on page 10, and in particular, items 5, 6, 7, 8, 8 again, and 9 are wholly unsupported by the record. It is the position of the appellant that this Court need but look to the actual terms of the contract between the parties, as embodied in the escrow instructions (TR 8, 9), to distinguish and to answer, and in fact resolve, all of the questions of law that are propounded by appellee in his brief. These cases are all clearly distinguishable on their facts. The actual terms of the contract between these parties were not strictly that of a seller and purchaser, because in the strictest sense both parties were selling and both parties were buying, and it was not the obligation of appellant to deliver the ten first mortgages and notes as verified and insured by Union Title Company until the closing date of the escrow (TR 8, 9) which was "the date upon which Western Equities, Inc., stock had been listed on the American Stock Exchange and *delivered to escrow agent*" (Emphasis added).

At no time from the transcript of record did appellee ever meet that condition, and whether or not he was required to do so, appellant believes, should be determined by the actual terms of the contract between the parties and that the conditions upon the parties were in fact concurrent. The entire thrust of appellee's brief is to change the actual contract of the parties and by insinuation infer that appellant was required to perform prior to the time the appellee was required to perform. The contract documents clearly set a time for performance and only then was appellant required to deliver that which the contract called for.

The law is quite clear as set forth in *Corbin on Contracts*, Ch. 68, § 1260, that:

> "A promisor is not justified in failing to render his promised performance by the mere fact that he reasonably believes that there will be a failure of consideration in the future. Prospective failure is more difficult to prove than is an already existing failure. It is determined by a process of prediction, not by history.******** It seems enough to say that the court must be thoroughly convinced that the agreed equivalent will not be rendered. The Plaintiff certainly should be given ample opportunity to show that the *present appearances* are not final or conclusive or even to give security in some reasonable form that he will perform when the time comes." (Emphasis added)

Appellee has cited the case of *Alaska Airlines v. Molitor*, 285 P.2d 893 (Wash. 1955), which on its face appears to support the position of the appellee, but a closer examination of the case reveals that the parties in the *Alaska Airlines* case were confronted with a wholly different form of contract than the one in the instant case. In the *Alaska Airlines* case the contract to purchase created an installment obligation calling for monthly payments after the down payment of $1,000 per month, and after the buyer had deposited his $12,000 earnest money, it became apparent to him that notwithstanding the payments that he would be making, the seller could not deliver that which he had contracted to sell and therefore the court *on the basis of that contract* ruled that the purchaser had the right to cancel the agreement. That is not the case that is before this court. Appellee was required by the terms of the contract to tender performance before it could in fact conclude that appellant could not perform, for the conditions of the contract between the parties at hand were concurrent, 2 *Williston on Sales*, §§ 447, 448.

APPELLEE HAS FAILED TO MEET THE ISSUE REGARDING THE LAW RELATING TO SUMMARY JUDGMENT

An examination of appellee's brief discloses that except by an effort to insert extraneous and conclusionary matters unsupported by the transcript of record, appellee has failed to meet the thrust of this appeal as set forth in appellant's Specification of Error I in that the record discloses a material issue of fact, thereby preventing summary judgment. It was the contention of appellee in his motion for summary judgment that appellee was excused from the performance of this contract because he believed appellant could not perform. The record discloses a controverting affidavit of James E. Mack (TR 96-100) which states that the conditions could have been met and were in the process of being negotiated and met and arrangements were being made to satisfy each and every one of the items which appellee has taken great pains to point out to the Court. This affidavit when construed with the other exhibits filed in response to appellee's motion for summary judgment (TR 101, 102, 103, 104, 105 and 106) clearly raises the issue and a most

material one of whether or not appellant could or could not have performed. Appellee has failed to meet the law that where on its summary judgment the record will be viewed favorably in light of the party opposing the motion and that the pleadings are to be construed liberally in favor of the party opposing the motion and that summary judgment is only proper when after an examination of the entirety of the record viewed favorably to the opponent it appears to the court from the pleadings, affidavits, exhibits, depositions and admissions reflected that there is no genuine issue as to a material fact. Only then is a party entitled to summary judgment. *Bouler v. Columbia Broadcasting Systems, Inc.*, App. D.C. 1962, 82 S.Ct. 486, 368 U.S. 464, 7 L. Ed. 2d 458; *Cress Auto Supplies, Inc. v. Ero Mfg. Co.*, C.A. Ill. 1966, 360 F.2d 896.

As appellant reviews the transcript of record in this matter, it finds that each and every proceeding was bitterly contested and controverted. The findings of fact and conclusions of law that the court entered clearly disclose that the court endeavored to try the issues of fact, and in fact weighed evidence and resolved issues in determining the motion for summary

judgment, for necessarily, in order to grant summary judgment the court would have had to weigh the Peipelman and Snell affidavits against the Mack affidavit and exhibits, and this being the case, the court clearly exceeded the powers conferred under Rule 56, for it has long been the basic mission of summary judgment that the court's duty is limited to a determination of whether factual issues exist, but not to determine and try those issues. *Empire Electronics Co. v. United States*, C.A. N.Y. 1962, 311 F.2d 175; *National Screen Service Corp. v. Poster Exchange, Inc.*, C.A. Ga. 1962, 309 F.2d 647; *Hamman v. United States*, D.C. Mont. 1967, 267 F. Supp. 411.

If this Court but reads the findings of fact and conclusions of law made by the trial court, it cannot help escape the conclusion that the court made factual findings by referring to portions of the record where disputed issues of fact appeared and this likewise is beyond the scope of Rule 56, *Bolack v. Underwood*, C.A. N.M. 1965, 340 F.2d 816.

CONCLUSION

Contrary to the conclusion reached by appellee in his brief, there is no substance to the allegation that the motion for summary judgment was granted as a result of appellant's willful failure to answer interrogatories fully and completely. However, as appellee so deftly puts the matter, the court below should be reversed upon the issue alone of the excess in the application of the provisions of Rule 56, *Federal Rules of Civil Procedure*, when he purported to act as the trier of the facts and conducted a trial by affidavits, thereby depriving appellant of its opportunity to be heard upon the merits of its claim which are not so plainly frivolous nor lacking in merit as appellee would like this Court to believe.

Respectfully submitted,

KANNE, BICKART & CROWN

By /s/ Allen B. Bickart

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Allen B. Bickart
Allen B. Bickart

AFFIDAVIT OF SERVICE BY MAIL

ALLEN B. BICKART, being duly sworn, says that he deposited three (3) copies of the foregoing Appellant's Reply Brief in final printed form in the United States Post Office in the City of Phoenix, State of Arizona, enclosed in an envelope duly addressed to Snell & Wilmer, 400 Security Building, Phoenix, Arizona 85004, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States Post Office in the City of Phoenix, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 30th day of December, 1967.

/s/ Allen B. Bickart
Allen B. Bickart

Subscribed and sworn to before me
this 30th day of December, 1967.

/s/ Polly Ann Campbell
Notary Public

My commission expires:

June 5, 1971